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IN THE

Supreme Court of the United States

October Term, 1930.

No. 520.

LEWIS-SIMAS-JONES COMPANY,
Petitioner,

v.

SOUTHERN PACIFIC COMPANY,
Respondent.

REPLY BRIEF FOR PETITIONER.

ERNEST CLEWE,
ROBERT E. QUIRK,
Attorneys for Petitioner.

E. W. HOLLINGSWORTH,
Of Counsel.

PRESS OF THE SUDWARTH CO., WASHINGTON

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REPLY BRIEF FOR PETITIONER.

SUMMARY OF CONTENTIONS MADE IN BRIEF OF RESPONDENT TO WHICH THIS REPLY BRIEF WILL BE ADDRESSED.

The main contentions made by respondent in its brief in respect to this case may be summarized as follows:

1. Respondent contends that the Interstate Commerce Commission was without jurisdiction to award damages in this instance because respondent maintained a rate from Nogales, Ariz., the border point, which would have been applicable to carload shipments of cow peas originating at that point or to shipments rebilled at that point, and that as the local rate was not alleged to be or found to be unreasonable there was no violation of the Interstate Commerce Act within the contemplation of the decision in *News Syndicate Co.* v. *N. Y. C.*, 275 U. S. 179, on which the Commission could base an order.

2. Respondent does not contend that the rate from border point was applicable to the shipments here involved which moved on through bills of lading executed by the Southern Pacific Railroad Company of Mexico at Navojoa, Mexico, for through carriage to San Francisco, Calif., through the port of Nogales, Ariz.; but respondent does contend that the shipper could have obtained the application of the local rate from the border point to San Francisco had he elected to bill the shipments from Navojoa, Mexico, to Nogales, Ariz., and there made arrangements to have them rebilled from that point to San Francisco.

3. Respondent contends that the court below was right in holding that as respondent maintained a rate as required by the Interstate Commerce Act on shipments billed or rebilled from Nogales, Ariz., to San Fran-

cisco, the petitioner was not compelled to pay the joint through rate of $1.33 found unreasonable by the Commission, and that the court below was right in holding that in the circumstances of this case there was no violation of the act upon which the Commission could predicate an award of damages.

4. Respondent contends that the joint through rate of $1.33 applicable to shipments made as these were on through bills of lading is not subject to the jurisdiction of the Commission but by the bill of lading contracts issued by the carrier at Navojoa, Mexico, the transportation, the joint rates are subject to the Mexican classifications and tariffs in force on the date of shipment, all of which were filed with the Department of Communications and Public Works of Mexico.

5. Respondent contends that it is inconsistent for the Commission to hold that it may determine the reasonableness of an international joint rate to ascertain damages, while at the same time holding that it has no power to require carriers subject to its jurisdiction to establish and maintain a joint international rate for the future.

6. Respondent contends that by the amendment to section 1 of the Interstate Commerce Act, effective February 1, 1920, which added the phrase "but only in so far as such transportation or transmission takes place within the United States" the jurisdiction of the Commission theretofore conferred

was narrowed, and respondent implies by this that, whereas the Commission had had jurisdiction over joint international rates prior to 1920 that jurisdiction was modified by the amendment made in 1920.

RESPONDENT'S CONTENTIONS ARE UNSOUND AND ARE UNSUPPORTED BY THE LAW AND THE DECISIONS.

Most of the contentions made by respondent on brief have been dealt with in a general way at least in the briefs of *amicus curiae* and of petitioner. However a more critical analysis of respondent's contentions as they are here summarized may be of some aid to the Court. The six summarized contentions will be dealt with together as there is more or less of a dovetail in the subject matter of each. We will undertake to show that the premise on which these contentions rest and the contentions themselves are unsound and are not supported by the decisions of the courts or of the Commission or by the law.

It was the duty of the respondent to maintain and apply a just and reasonable rate to the transportation service actually performed in respect to the shipments here involved, as they were made. The court below erred in finding that the respondent met its full duty under the act by maintaining a rate from the border point which would have been applicable to shipments originating at that point and to shipments rebilled from that

point to San Francisco but which was not applied and was not applicable to the shipments as made.

Under Section 1 (5) of the Interstate Commerce Act railroads, common carriers, must not only maintain just and reasonable charges for services rendered, but must apply just and reasonable charges to the service which they perform. And under Section 6 of the act, these charges must be published and kept open to public inspection and must show the places between which they apply.

The contention of respondent that the shipper had the choice of rates in respect to the shipments here involved and could have obtained the application of the local rate from Nogales, Ariz., to San Francisco had he elected to arrange to have the shipments rebilled at Nogales is unsound. In the first place, this contention begs the question. In the second place one of the great purposes of the Interstate Commerce Act and of the Elkins Act, 32 Stat. L. 847, 34 Stat. L. 584, was to cut out by the roots all forms of discrimination and to require common carriers to publish, maintain and apply specific and certain rates and charges to both interstate and foreign commerce. *Cosmopolitan Shipping Co.* v. *Hamburg-American Packet Co.*, 13 I. C. C. 266. The only commerce excluded from Section 1 is commerce moving wholly within a state.

It is settled law that there can be only one legal rate applicable to the movement of commerce sub-

ject to the act between given points. In *United States* v. *Gulf Refining Co.*, 268 U. S. 542, this Court cited with approval the finding made by the Commission in *U. S. Industrial Alcohol Co.* v. *Dir. Gen.*, 18 I. C. C. 389, 392, where the Commission said:

> "There could not have been at the same time rates legally applicable and other rates 'technically' legally applicable. There can be but one applicable rate at the same time over the same route between the same points on the same traffic."

In *Armour Packing Co.* v. *United States*, 209 U. S. 56, 81, this Court said that the law

> "has provided for the establishment of one rate, to be filed as provided, subject to change as provided, and that rate to be while in force, the only legal rate."

And, in the same case, this Court said:

> "It was the central and controlling purpose of the law to require all shippers to be treated alike, and but one rate to be charged for similar carriage of freight, and that the filed and published rate, equally known by and available to every shipper."

In *Boston & Maine R. Co.* v. *Hooker*, 233 U. S. 97, 110, this Court said it was

> "the purpose of the Act to have but one rate, open to all alike, and from which there could be no departure."

This language was again repeated by the Court in *L. & N. R. R. Co.* v. *Maxwell*, 237 U. S. 94, 97. To the same effect is *Baltimore & Ohio* v. *Settle*, 260 U. S. 166.

But the respondent contends that the doctrine of these cases is applicable only to domestic commerce between points within the United States. It is significant that the finding of this Court in the *Armour case*, 209 U. S. 56, is in respect to an indictment charging rebates on a shipment moving by rail from Kansas City to New York City for transshipment to Christiania, Norway, on a through bill of lading, and as to which the originating carrier agreed to carry to the destination in Norway for a through rate which included the carriage by and the rate of the steamship line. The bill of lading issued by the originating carrier was delivered to the Traders Dispatch, a fast freight line, which issued in lieu thereof a through bill of lading for the goods at a through rate to Christiania. The rate agreed to between Armour and the originating carrier, the Chicago, Burlington & Quincy, was 12 cents per 100 pounds less than the rate that would have been made by adding to the steamer charge the published proportional rate to New York filed with the Commission. In that case counsel for Armour urged that since the transportation was on a through

bill of lading to a foreign country under a through contractual arrangement, it was not subject to the act to regulate commerce, that the rates applicable thereto were not required to be published and filed with the Commission, and that there was no prohibition against rebating in respect to such rates. As to that contention the Circuit Court of Appeals for the Eighth Circuit, speaking through Sanborn, C. J., said at page 10 of 153 Fed. 1:

> "It is contended that, although the act may apply to the carriage of property in foreign commerce when consigned from a place in the United States to the port of transshipment for export, to be there again consigned to its destination in the foreign country, yet it has no application to the transportation of such property under a through bill of lading from the place of the origin of the carriage to the foreign destination. The proposition cannot be sustained. The act is general, comprehensive, includes within its express terms all transportation of property in foreign commerce from the place of origin in the United States to the port of transshipment, and it contains no exception of such carriage under through bills of lading."

And at page 12 said:

> "If those rates are separate from the ocean rates they may undoubtedly be separately filed and published, and the ocean rates may be added to make aggregate through rates,

as was done in the case under consideration. If by agreement or arrangement between the inland and the ocean carriers or by common control the inland rates become parts *of joint through rates*, then the *latter rates become the rates of transportation* to or from the ports of transshipment from or to the places of the origin or destination of the traffic in the United States, and they thereby fall within the terms and reason of the law."

When the case reached this Court, Mr. Justice Day, dealing with the same question, said:

"It is further contended by petitioners that the statutes have no application to a shipment on a through bill of lading from an interior point in the United States to a foreign port. It is alleged that the Elkins law refers to the original interstate commerce act, and that its terms do not include such shipments. Analyzing the first section of the Act (24 Stat. L. at 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154), it is said that it applies to the following kinds of commerce: (a) Interstate Commerce; (b) commerce between the United States and an adjacent foreign country; (c) commerce between places in the United States passing through a foreign country; (d) commerce from the United States to a foreign country, only while being transported to a point of transshipment; (e) commerce from a foreign country to points in the United States, but only while being carried from port of entry either in the United States or an adjacent foreign

country. And it is contended that sec. 6, as amended (25 Stat. at l. 855, chap. 382, U. S. Comp. Stat. 1901, p. 3158), does not require the filing of through export tariffs.

The purpose of Congress to embrace the whole field of interstate commerce is made apparent by the exclusion only of *wholly domestic commerce* in the last clause of section 1 of the original act of 1887, and in the declaration of the scope and purpose of the act, declared in its title. *Texas & P. R. Co.* v. *I. C. C.*, 162 U. S. 197, 211, 40 L. Ed. 940, 944, 5 I. C. Rep. 405, 16 Sup. Ct. Rep. 666. There is no attempt in the language of the Act to exempt such foreign commerce as is carried on a through bill of lading; on the contrary, the act in terms applies to the transportation of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment.

What reasonable ground is there for supposing that Congress intended to exercise no control over such commerce if it happens to be billed through to the foreign port? *Such construction would place such important commerce shipped in the United States to a port for transshipment abroad wholly outside the restrictions of the law, and enable shippers to withdraw such commerce from the regulations enforced against other interstate commerce by the expedient of a through bill of lading.*" (Italics ours).

The construction of the act urged by the respondent and sustained by the lower court places the character of commerce and the rates here involved outside of the prohibitions and the duties imposed by the act and leaves the carrier free to indulge in the very practices as to this commerce the act to regulate commerce was designed to prevent.

The shipper's right to enjoy reasonable rates under the Interstate Commerce Act is not contractual because the amount to be paid for transportation as a matter of contract is fixed by the tariffs of the carriers on file with the Interstate Commerce Commission. And no matter how excessive the rate published may be, the shipper is obliged under the law to pay it. The doctrine of the cases here cited that there can be but one lawful rate, is as applicable to shipments moving from a foreign country on a through bill of lading as it is to shipments moved in interstate commerce between points within the United States.

As to the proposition that there can be but one lawful rate applicable to commerce subject to the act, respondent contends that neither the rule in the *Settle case* nor any other rule of interpretation of the act by the courts or the Commission can be extended beyond the boundary line into the territory of an adjacent foreign country so as to control the transportation service there performed "compelling shippers there to use, and foreign carriers to observe, a joint through rate as the only rate applicable" and that "no provision of the

act can be invoked to forbid a shipper from billing a shipment, intended to move to a United States destination, at the local rate to the boundary line, and thence rebilling at the domestic rate." The Commission did not exercise extraterritorial powers in finding the rate here in issue unreasonable and in awarding damages. While it may be conceded that the Commission has not the power to control the manner in which shippers and carriers in a foreign country may elect to route or bill shipments from a foreign country to a point in the United States, neither does there appear to be anything in the Interstate Commerce Act by which a shipper in a foreign country may be compelled to bill a shipment to a border point and designate an agent at that point to rebill the shipment to a point in the United States. But this is not to say that the Interstate Commerce Act does not provide that there shall be but one lawful rate applicable to particular commerce according to the service rendered by the carrier subject to the act with respect to that commerce. It is not open to a carrier either under the Interstate Commerce Act or the Elkins Act to maintain two or more rates applicable to the same transportation service whether it be in respect to interstate or foreign commerce. Under these acts there can be but one lawful rate applicable to the transportation of property in respect to the service performed in the carriage of such property.

In *United States* v. *Grand Trunk Ry. Co. of Canada*, 225 Fed. 283, the defendant was indicted under the Elkins Act for rebating in respect of passenger fares charged a theatrical troup for a trip from a point in the United States through Canada to another point in the United States. Defendant urged that this did not constitute a violation of the act because a part of the trip was through Canada, and alleged that to be valid the indictment should state that the payment of rebates was on the American portions of the journey. As to that contention the Court said:

> "The question thus presented is perhaps not wholly free from difficulty, but it must be considered in connection with the intention of Congress to make provision for the transportation of commerce, not only between states and territories, but to and from foreign countries, and broadly for 'the whole field of commerce,' excluding intrastate. *Texas & P. R. R. Co.* v. *I. C. C.*, 162 U. S. 197, 16 Sup. Ct. 666, 40 L. ed. 940. The indictment is not open to the inference that the transportation in question was for separate completed journeys in Canada. The offense consisted of a plan to divert passenger traffic to the lines of the defendant company which extended from points in the United States through Canada to other points in the United States. The question, however, of the payment of rebates or refunds on fares betwen points in Canada exclusively arises only as an incident of the entire transportation which originated in the

United States, for the indictment as I read it, substantially charges that the rebates were to be paid from the aggregate fares for the entire journey under an agreement devised to evade the statute. The route from Detroit to Boston was evidently regarded by the parties to the agreement as a theatrical circuit for shows of the Empire Circuit Company, and, although stops were made along the way for the giving of performances, the idea no doubt was that the journey was to be practically continuable."

The Court sustained the indictment and it should be kept in mind in considering this case that the rebate dealt with was from the *aggregate fares for the entire journey* from a point in this country through Canada to another point in this country.

Galveston, Harrisburg & San Antonio Ry. Co. v. *Woodbury*, 254 U. S. 357, decided December 13, 1920, dealt with a suit for damages. Mrs. Woodbury traveled from a point in Ontario, Canada, to El Paso, Texas, and returned on a joint through ticket with stop-overs permitted at various points. At some point en route between San Antonio and El Paso the railroad lost her trunk. She sued for the value of the trunk and contents, which the jury found to be $500. The carrier insisted that it was not liable for more than $100 since it had filed with the Interstate Commerce Commission a tariff limiting its liability to that amount. The question presented was whether the transporta-

tion of the lost property was subject to the Act to Regulate Commerce, although begun in a foreign country.

At page 359 of the decision Mr. Justice Brandeis said:

"But counsel for Mrs. Woodbury insists that solely because her journey originated in Canada, the provisions of the Act to Regulate Commerce do not apply. The contention is that Section 1 of the Act of 1887 does not apply to the transportation of passengers from a foreign country to a point in the United States. To this there are two answers. The first is that the transportation here in question is not that of a passenger, but of property. *Boston & M. R. Co.* v. *Hooker*, *supra*. The second is that the act does apply to the transportation of both passengers and property from an *adjacent* foreign country, such as Canada. Section 1 declares that the act applies 'to any common carrier * * * engaged in the transportation of passengers or property * * * from any place in the United States to an adjacent foreign country.' A carrier engaged in transportation by rail to an adjacent foreign country is, at least ordinarily, engaged in transportation also from that country to the United States. The test of the application of the act is not the direction of the movement, but the nature of the transportation as determined by the field of the carrier's operation. This is the construction placed upon the act by the Interstate Commerce Commission. *International Paper Co.*

v. *Delaware & H. Co.*, 33 Int. Com. Rep. 270, 273, citing *Texas & P. R. Co. v. I. C. C.*, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666."

This Court sustained the limitation of liability published in the tariffs of the carrier under the joint rate, and reversed the judgment of the lower court, despite the fact that the contract was made in a foreign country and that the Carmack amendment fixes the liability upon the initial carrier for the loss and damage sustained. It is interesting to observe that in the Woodbury case it was the carrier, which is a part of the Southern Pacific Company, respondent in this case, which contended that the status of the parties was fixed and determined by the joint rate applicable from Canada to the United States.

In *Western Union Telegraph Co.* v. *Esteve Brothers & Co.*, 256 U. S. 566, suit was brought to recover damages from the telegraph company resulting from the erroneous transmission of an unrepeated cablegram from Barcelona, Spain, to New Orleans. The message traveled over the lines of the Spanish government telegraph from Barcelona to Paris, and thence over the lines of the French government to Havre, thence via the Western Union cable lines to New York and over its land lines to New Orleans. The Western Union rate from Havre to New Orleans was carried in its tariffs on file with the Commission, which limited its liability in respect to unrepeated messages

to the charge made for tolls. The question presented was whether the sender without assent in fact to the limitation of liability, was, as a matter of law, bound thereby because that limitation was a part of the lawfully established rate. After noting that the Act to Regulate Commerce included telegraph and cable companies engaged in sending messages between the United States and foreign countries, Mr. Justice Brandeis, at page 572 of the decision, said:

> "And whatever may have been the legal incidents of transmitting the message from Barcelona to Havre under Spanish and French law, the Western Union, in sending the message over its own lines from Havre to New Orleans, was governed by the provisions of that act."

These decisions dispose of the contention made by respondent here, first, that a joint international rate is not subject to the Interstate Commerce Act and to the jurisdiction of the Commission; and, second, that the rights of petitioner and the shipper in Navojoa, Mexico, are governed entirely by the bill of lading contract, the laws and the tariff classifications of Mexico made a part of that contract. In so far as the bill of lading contracts contain rates or other conditions which are contrary to the duties imposed upon the railroads in this country under the Interstate Commerce Act, they are void as contrary to public policy. 10 Corpus Juris 510.

We have shown that the first four contentions in the summary of contentions made by respondent on brief are unsound in practically every respect. Respondent cannot consistently contend that the *Armour Packing Company case, supra,* does not support the point made by us which is that a joint international rate is subject to the jurisdiction of the Commission because on page 26 of its brief it states that there should be no distinction "as between shipments moving by rail and water from interior points in non-adjacent foreign countries to points in the interior of the United States." At page 26 of its brief respondent also argues that if the Commission has the power to exercise the jurisdiction asserted here it "would be required to extend its investigation far beyond the territorial limits of the United States, and to invade the sovereignty of friendly foreign nations, in order to be properly informed." This argument is answered by the decision of this Court in the *News Syndicate case,* which holds unequivocally that where a railroad does not maintain a just and reasonable rate applicable to the transportation service from the border, the Commission may inquire into the reasonableness of the entire joint rate and thereby inform itself in respect to conditions in a foreign country. If the Commission has the power for one purpose it must have it for another. In these circumstances there is no point to this argument.

The decisions cited show that the court below erred in holding that as the respondent maintained a rate on carloads of cow peas billed or rebilled from the border point to San Francisco the petitioner was not compelled to pay the joint through rate of $1.33 per 100 pounds found unreasonable by the Commission and on that account there was no violation of the act upon which the Commission could predicate an award of damages. In this conclusion the court below erred in two important particulars: First, it erred in holding that the petitioner was not compelled to pay the joint through rate found unreasonable by the Commission; and, second, it erred in holding that the local rate applicable from Nogales, Arizona, the border point, to San Francisco on shipments billed or rebilled from that point was applicable to the shipments of petitioner as actually made. These findings by the court below are in direct contradiction to the contentions of respondent. Respondent concedes and contends that the shipper, having elected to make the shipments on through bills of lading from Navojoa, Mexico, to San Francisco, is bound by the terms of those bills of lading, the rates named therein, and the Mexican law and tariffs applicable thereto, and that for these reasons the local rate from Nogales, Ariz., to San Francisco was not applicable to the shipments as made. The respondent's contention is that the local rate from Nogales would have been applicable had the shipper elected to bill the shipments

from Navojoa, Mexico, to Nogales, Ariz., and there arrange to have them rebilled from Nogales to San Francisco. The court erred also in failing to find that the respondent did not maintain and did not apply any rate applicable from the border to the shipments and the kind of transportation service actually performed by the respondent. The failure of the respondent to maintain and to apply just and reasonable rates from the border to the transportation service actually performed in respect to these shipments is a violation of section 1 of the Interstate Commerce Act. The Commission's order is predicated on such a violation. It is true that the Commission found the entire rate to be unreasonable, but that was also true in the *News Syndicate case*.

In addition, the duty of railroads to publish rates to and from the boundary line is not exclusive and all embracing. They have the alternative in respect of their participation in joint international rates. In other words, as the Commission held in *Cyanamid & Cyanide from Niagara Falls*, 155 I. C. C. 488, the fact that the carriers had committed a tort in failing to make or publish any rate applicable to that part of the transportation within the United States "is not conclusive that they could commit no tort in respect of a joint international rate" is sound doctrine. And the Commission has the power to determine whether a particular joint rate participated in by a carrier subject to its jurisdiction was unjust and unreasonable. This view is sus-

tained by the decisions of the Commission itself and by the decisions of this Court already cited.

United States v. *Pacific & A. R. & N. Co.*, 228 U. S. 87, cited in our brief, and *Texas & Pacific* v. *I. C. C.*, 162 U. S. 197, are we think authority for the proposition that the Commission has the power to reach a carrier subject to its jurisdiction and to consider the entire rate where the allegation is that the carrier has exacted unreasonable charges by means of a joint rate or otherwise in respect of commerce moving from a foreign country to a point in the United States.

In *Texas & Pacific* v. *I. C. C.*, *supra*, frequently called the *Import case*, this Court reversed an order of the Commission which was based in part on the view taken by the Commission that, in determining whether the prohibitions in the act against unjust discrimination and undue prejudice were violated in respect of commerce from foreign countries moving under joint rates, the Commission could not consider conditions beyond the seaboard of the United States. As to that the Court said:

> "In determining questions of the reasonableness of rates, and of discrimination, in respect to traffic originating in foreign countries, the Commission and the courts may and should take into consideration, as constituting dissimilar conditions, circumstances existing beyond the seaboard of the United States (such as competition by ocean freights), as well as conditions prevailing within the United States."

One of the contentions in that case was that the place at which joint rates should be published for the information of shippers would be at the place of the origin of the imported freight, and that this cannot be done or be compelled to be done by the Commission in foreign ports. After reciting this contention the Court said:

> "The force of this contention is not perceived. Room is left for the application of these provisions to traffic originating within the limits of the United States, even if, for any reason, they are not practically applicable to traffic originating elsewhere. Nor does it appear that the commission may not compel all common carriers within the *reach* of their jurisdiction to publish such rates, and to furnish the commission with all statements or reports prescribed by the statute. Nor was there any allegation, evidence, or finding in the present case that the Texas & Pacific Railway Company has failed to file with the commission copies of its joint tariffs, showing the joint rates from English ports to San Francisco, nor that the company has failed to make public such joint rates in such manner as the commission may have directed."

The respondent also contends that the action of the Commission in the instant and similar cases in exercising jurisdiction to determine that a joint international rate is unreasonable and to award damages, if found unreasonable, is inconsistent

with decisions in which it holds that it has not the power to require carriers to establish and maintain joint international rates for the future. Even if as to this general question the Commission has been inconsistent as claimed by respondent, that fact would be wholly unimportant in considering the validity of the order here under review. *Virginian Railway Co.* v. *U. S.*, 272 U. S. 658. But there is no necessary connection between the quasi judicial function of determining that a rate charged was unreasonable to ascertain the damage and the exercise of the quasi legislative function of fixing a reasonable rate for future application. *Baer Bros. Mercantile Co.* v. *D. & R. G.*, 233 U. S. 479. Moreover it is one thing for the Commission to require a carrier subject to its jurisdiction to join a carrier in a foreign country to establish a joint rate, and it is quite another thing for the Commission to determine whether a joint rate voluntarily established by a carrier subject to its jurisdiction is in violation of the Interstate Commerce Act.

However, the Commission has exercised the power to find that joint international rates applicable to commerce from Canada to destinations within the United States will be unreasonable for the future to the extent that such rates exceeded reasonable rates and has required the railroads subject to its jurisdiction to cease and desist from participating in the rates found unreasonable. *Spanish River Pulp & Paper Mills* v. *A. & W. Ry. Co.*, 113 I. C. C. 343, and 120 I. C. C. 251. In the

latter case where the power of the Commission was challenged to require the defendants to cease and desist from participating in unreasonable rates for the future, the Commission said:

> "If we may require American lines to pay reparation under internatioinal joint rates, how much more rational is the assumption that we may require them to refrain from participating in and applying rates which will render them subject to such judgments."

But respondent contends that the amendment to section 1 of the Interstate Commerce Act made February 1, 1920, which added the phrase "but only in so far as such transportation or transmission takes place within the United States" narrowed the jurisdiction the Commission theretofore had in respect to foreign commerce. On this premise respondent contends that the Commission now has no jurisdiction to determine the reasonableness or lawfulness of a joint international rate exacted by a carrier subject to its jurisdiction in respect to international commerce except where the carrier fails to maintain a rate from the border. We have not been able to find anything in the reports of the committees of Congress which considered the Transportation Act and the amendments to the Interstate Commerce Act made in 1920 which throws light on the reasons for the 1920 amendment. It does appear, however, that the use of the phrase "adjacent foreign country"

in the act as it read prior to the amendments in 1920 had caused some confusion, and that the main change in section 1 in respect to the transportation of passengers and property to and from a foreign country was the elimination of the word "adjacent." Section 1 (c) here pertinent, now reads that the act applies to the transportation of passengers and property "to any place in the United States to or from a foreign country, but only in so far as such transportation takes place within the United States." Under the language of the former act, there was room for doubt as to whether it applied to transportation from an adjacent foreign country to a point in the United States until the decision of this Court in the *Woodbury case*, 254 U. S. 357. At all events, in view of the enlarged powers conferred upon the Commission by the amendments to the act made in 1920, it is almost paradoxical to say that the inclusion in section 1 of the phrase "but only in so far as such transportation or transmission takes place within the United States" may be construed as restricting the powers theretofore possessed by the Commission over the rates, rules, regulations and practices of common carriers subject to the act in respect to foreign commerce.

The inclusion of these words in section 1, when considered in connection with the entire act and the general purposes thereof, are but the "expression of a necessary implication" to paraphrase the language used by this Court in *United States* v. *Pennsylvania R. R.*, 242 U. S. 208, in respect to

a point similar in principle. In that case the Pennsylvania Railroad filed a suit to enjoin an order of the Commission which required it, in effect, to supply tank cars or else be chargeable with unjust discrimination. One of the points relied upon in that case by the government was that the amendment to the Act to Regulate Commerce of 1906 which added to section 1 "and it shall be the duty of every carrier to provide and furnish such transportation upon reasonable request therefor," gave the Commission additional power over facilities and instrumentalities. As to that contention this Court said:

> "This, however, is but the expression of a necessary implication. It was useless to declare that whatever a carrier must do he must do upon reasonable request."

Likewise, it is reasonable to argue here that as neither Congress nor the Commission has extra-territorial jurisdiction, the addition of the phrase "but only in so far as such transportation or transmission takes place in the United States" in the amendment of 1920 is but the expression by Congress of a necessary implication in the more general language of the act as it stood prior to 1920.

In *International Nickel Co.* v. *Dir. Gen.*, 66 I. C. C. 627, the Commission itself dealt with a similar contention in the following manner:

"It is said that the amendments made by the transportation act, 1920, in section 1 of the Act to Regulate Commerce, as amended, have changed or restricted the jurisdiction which was theretofore vested in us by that section. These amendments carry our territorial jurisdiction up to the international boundary line, at which that of Congress itself halts. *Our territorial jurisdiction as to foreign commerce is thus co-extensive with that of the federal government.* No act of Congress has force of law beyond that boundary line, but up to it, as everywhere else within the United States, the Interstate Commerce Act has full effect, just as the Federal Control Act had effect when these shipments moved."

A reading of the entire act including section 1, indicates a clear purpose on the part of Congress to give to the Commission the extent of its power to regulate transportation between the United States and adjacent foreign countries. The power of Congress over the subject matter here in controversy is not only not questioned but is conceded. Respondent concedes that Congress could prescribe the terms and conditions under which railroads in this country might participate in joint rates. But it contends that Congress has not delegated such power to the Commission. Such a view requires a very narrow construction of the Interstate Commerce Act, and is inconsistent with the repeated expressions of this Court as to the extent of the power of the Commission in re-

spect to rates, regulations, rules and practices both under the Interstate Commerce Act and the Elkins Act. In the famous *Shreveport case*, *Houston & Texas Ry.* v. *United States*, 234 U. S. 342, it was contended that while Congress had the power to regulate rates on intrastate commerce so as to prevent unjust discrimination against interstate commerce that power had not been delegated to the Commission. As to this the Court said, at page 356, after referring to the language of the act:

> "This language is certainly sweeping enough to embrace all the discriminations of the sort described which it was within the power of Congress to condemn."

There is no basis for the view that Congress has withheld from the Commission any power to correct any wrongs forbidden by the Interstate Commerce Act or the Elkins Act committed by a railroad subject to its jurisdiction in respect to commerce moving from an adjacent foreign country in respect to foreign commerce in so far as that commerce is within the jurisdiction of Congress. Such a view is inconsistent with the language of the act and with its general purposes.

As already observed, the respondent contends that in view of the 1920 amendment to section 1 of the Interstate Commerce Act, referred to, the Commission has no jurisdiction over the commerce of the railroads otherwise subject to the act

as to charges exacted on commerce moving from a foreign country on a joint rate to a destination within the United States. If respondent is right in this contention, it means that by the simple participation in a joint rate on international commerce both the commerce and the railroad become immune from the regulatory powers of the Commission as to such rates. If Congress intended to bring about such an extraordinary situation it is reasonable to assume that it would have expressed itself in plain terms.

As to this respondent says that the court below declared that the international through rate is outside the jurisdiction of the act only when it affirmatively appears that the carrier within the United States has met its duty by maintaining a reasonable rate from the border, and that such a situation results from a defect in the statute itself. Respondent also states that unjust discrimination, rebating and the maintenance of more than one legal rate may be avoided where the carriers publish and maintain rates for transportation service within the United States and hold out "to interested shippers an opportunity to have such rates and charges applied." The respondent also goes so far as to suggest that where a carrier maintains a rate from the border no harmful results can follow if the carrier at the same time and "as a matter of convenience" maintains and applies a joint rate from the point in the foreign country to the destination in the United States. This is merely an argument *in extremis*,

and does not meet the point made by us, which is that so long as a joint rate is actually charged, the shipper who pays it has a right under sections 8, 13 and 16 of the Interstate Commerce Act to complain against the reasonableness of that charge and to recover damages if the acts of the carrier in respect to the charge are found to be in violation of the law.

In respect to the narrow construction that the respondent here urges be given the words "but only in so far as such transportation or transmission takes place within the United States," it is not without significance that in the *Woodbury* case, 254 U. S. 357, the Court rejected the contention that the Interstate Commerce Act as it read prior to 1920 did not apply to the transportation of passengers and property *from* an adjacent foreign country, like Canada, but only applied to passengers and property *to* an adjacent foreign country, and held that despite the restricted language in section 1 at that time that

> "a carrier engaged in transportation by rail to an adjacent foreign country is, at least ordinarily, engaged in transportation also from that country to the United States," and that the "test of the application of the act is not the direction of the movement, but the nature of the transportation as determined by the field of the carrier's operation. This is the construction placed upon the act by the Interstate Commerce Commission. *International Paper Co.* v. *Delaware & H. Co.*, 33 Int. Com. Rep. 270, 273, citing *Texas*

& P. R. Co. v. *I. C. C.*, 162 U. S. 197, 40 L. ed. 940, 5 Int. Com. Rep. 405, 16 Sup. Ct. Rep. 666."

In support of its contention that by the Interstate Commerce Act Congress has not given the Commission the full extent of its power to regulate international commerce, respondent refers to the decisions of the Commission in *Seymour* v. *M. L. & T. R. & S. Co.*, (1915) 35 I. C. C. 492; *Canales* v. *G. H. & S. A. Ry. Co.*, (1916) 37 I. C. C. 573; and *Fernandez v. S. P. R. R. Co. of Mexico*, (1925) 104 I. C. C. 193, in which the Commission held that it did not have jurisdiction as to rates on traffic moving from a foreign country through the United States *in bond* to a foreign country. In the *Woodbury case* the lower court held that as Mrs. Woodbury traveled from Canada on a ticket contract calling for transportation from a point in Canada and through the United States back to Canada, the contract was governed by Canadian laws, which in the absence of a showing to the contrary would be presumed to be the same as Texas laws. It cited certain of the above cases to support that finding. But this Court held that the cases cited which hold that transportation of property from a foreign country through the United States *in bond* to a foreign country is not subject to the act were not in point and that the transportation of the baggage lost between points in Texas on a contract made in

Canada which contemplated the transportation of the baggage as a part of the contract from that point to a point in the United States and back to Canada *not in bond* was subject to the act.

Apparently this Court has not been called upon to decide whether commerce moving from a foreign country through the United States in bond to a foreign country is subject to the Interstate Commerce Act. At all events the cases relied upon by respondent do not impair the contention made by us that Congress has delegated to the Commission the full extent of its power to regulate the rates and charges of carriers subject to the act in respect of transportation of foreign commerce subject to the act.

At the risk of repetition we again submit that the amendment to section 1 of 1920 here referred to did not restrict the power the Commission theretofore had over rates and charges, whether joint or otherwise, as to international commerce, and that that amendment is but the expression of a necessary implication which would have to be read in construing the extent of the power of Congress and the Commission whether or not the words of the amendment were actually stated in the act.

CONCLUSION.

The decision of the court below is based on an erroneous construction of the decision of this Court in the *News Syndicate case*. In addition, the court below held that the rate maintained from Nogales, Ariz., to San Francisco, applicable to shipments of cow peas billed or rebilled from that point was applicable to the shipments here involved which moved on through bills of lading and under through arrangements from Navojoa, Mexico, to San Francisco, and which were not billed or rebilled from Nogales, Ariz. This finding by the court is, as stated, in direct conflict with the position taken by the respondent on brief and in its answer which is that it applied the correct rate to the through shipment as made and that the local rate from the border was not applicable to these shipments but would have been applicable to different shipments differently handled to and from the border point. The respondent takes the high ground that the joint rate actually applied is governed by bill of lading contract, Mexican tariffs and the Mexican law, and that it is not subject to the jurisdiction of the Commission. This Court did not hold in the *News Syndicate case* that the mere maintenance of a rate by a carrier from the border point which is not used relieves the carrier of the duty of actually charging just and reasonable rates on foreign commerce. As pointed out in our brief, in holding in the *News Syndicate case* that the Interstate Commerce Act

applied to the lines that carried and to the transportation of the paper from the international boundary to New York City, the Court said:

> "It was the duty of defendants in error to establish just and reasonable rates *for that service.*"

and that

> "They failed to make or publish any rate *applicable* to *that* part of the transportation."

It is clear that in the *News Syndicate case* the Court held that a carrier could meet its duty under the act only in the event it maintained and *applied* a just and reasonable rate from the border point to the character of transportation service actually performed by it, and that the carrier does not meets its duty under the act by the mere expedient of maintaining a rate from the border point as a paper rate which it does not apply.

Where the published joint rate of a carrier, subject to the act, has been applied as the basis of exacting charges on through shipments from a foreign country, the carrier cannot claim that this rate is beyond the jurisdiction of the Interstate Commerce Act merely because the carrier maintains a local rate from a border point which it did not use but which might be used as to shipments billed or rebilled from that point. In such circumstances the carrier is in the same position

as were the defendants in the *News Syndicate case*, in that they failed to make or publish any rate *applicable* to *that part* of the transportation service from the border point.

Finally, if the finding of the court below that the rate maintained by respondent from the international boundary to San Francisco could have been applied to the shipments as made and was lawfully applicable, the judgment of that court should nevertheless be reversed because if the rate from the boundary was reasonable and lawfully applicable, the respondent violated the act in failing to apply that rate to these shipments. It is as much a violation of the Interstate Commerce Act for a carrier to fail to observe and apply the legal rate applicable to particular commerce as it is for a carrier to fail to publish and maintain a lawful rate between particular places.

Respectfully submitted,

ERNEST CLEWE,
ROBERT E. QUIRK,
Attorneys for Petitioner.

E. W. HOLLINGSWORTH,
Of Counsel.

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